# Supreme Court of the United States

OCTOBER TERM, 1941.

No. .....

AXEL HAWKINSON, PETITIONER AND APPELLANT BELOW,

VS.

GEORGE GASTON JOHNSTON, RESPONDENT AND APPELLEE BELOW.

GEORGE GASTON JOHNSTON, RESPONDENT AND APPELLANT BELOW,

VS.

AXEL HAWKINSON, PETITIONER AND APPELLEE BELOW.

## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTORARI.

I.

### OPINION BELOW.

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit is not yet officially reported but appears in the record at pages 100 to 113.

II.

## JURISDICTION.

The petition for the writ (*ante* page 10) states the grounds on which the jurisdiction of this Court is invoked. For brevity, that statement is not here repeated.

III.

## STATEMENT OF THE CASE.

The petition, under the heading "Summary and Statement of Matters Involved" (*ante* pages 2 to 10), sets forth a full statement of the case. For brevity, that statement is not here repeated.

IV.

## SPECIFICATIONS OF ERROR.

1. The courts below were without statutory jurisdiction because the total amount in controversy could not exceed $400, if Missouri law was declared and applied. If surrender of the lease was accepted, all liability was discharged and if it was not accepted, the total possible recovery under state law was $400 for rent for the July quarter. Apparent jurisdiction was usurped by refusing to follow Missouri law declared by its highest courts and by entering judgment on the theory of anticipatory repudiation of a lease, which doctrine has been consistently denied by the Missouri courts for lease contracts.

2. The courts below erred in ruling that the doctrine of anticipatory repudiation applies to leases in Missouri and erred in failing to declare and apply Missouri law as consistently declared by its highest courts, to the effect that an accepted surrender of a lease or actual or constructive re-entry after abandonment discharges all unaccrued covenants of a lease.

3. The courts below refused to declare and apply Missouri law as recognized by its highest courts and failed to give the same effect to a federal district court judgment that would have been given to it by the Missouri courts when it was affirmatively pleaded as *res judicata*, estoppel and as an election of remedies.

4. The courts below erred in refusing to declare and apply the law of waiver and the law on the construction and effect of an independent covenant in a lease as declared by the highest Missouri courts, and erred in applying principles of law which are declared for and limited to option agreements and which have no application under Missouri law to independent covenants made mandatory by a penal bond.

5. The courts below erred in refusing to declare and apply basic principles of Missouri landlord and tenant law and erred in setting aside the declared social and economic public policy of Missouri on important questions of local landlord and tenant law in ruling that the doctrine of anticipatory repudiation applies to Missouri leases.

## V.

## SUMMARY OF ARGUMENT.

1. The total amount in controversy, if Missouri law was applied, could not exceed $400 for one quarter's rent. If surrender of the lease was accepted, all liability was discharged. If it was not accepted, the maximum possible recovery was $400. Jurisdiction was usurped by refusal to declare and apply Missouri law and by holding that the doctrine of anticipatory repudiation applies to leases when the highest Missouri courts have ruled to the contrary.

2. The doctrine of anticipatory repudiation has been expressly denied for leases by the highest Missouri courts.

It has been consistently ruled that after acceptance of surrender or actual or constructive re-entry by the landlord after abandonment all unaccrued lease obligations are discharged in the absence of an independent covenant which survives termination of the lease. No covenant of that kind is claimed for this lease.

3. Respondent by suffering adverse final judgment in a suit filed in the same district court, to enforce the building covenant of the lease and to recover penalty on the bond guaranteeing erection of the building, was estopped by the principles of *res judicata,* election of remedies and estoppel by judgment from asserting that the building covenant was not discharged and that it was not an independent covenant and that a performance of the covenant was a condition for the exercise of the right of termination granted by the lease.

4. Because of express waiver of the building covenant and because the covenant was an independent one, the performance of which was made obligatory by penal bond, compliance with the building covenant in 1914 was not a requirement for exercise of the surrender right after 1914. The waiver was equivalent to performance. Performance of an independent covenant is not required where it is compensable in damages as a condition for exercise of the contract right of termination of liability contained in the lease.

## VI.

## ARGUMENT.

### I.

**The Total Amount in Controversy under Missouri Law Was $400, for One Quarter's Rent. If Surrender of the Lease Was Accepted All Liability Was Discharged. If It Was Not Accepted the Maximum Possible Recovery Was $400. Jurisdiction Was Usurped and Due Process of Law and Equal Protection of Laws Was Denied by Refusal to Apply the Law Consistently Declared by the Missouri Supreme Court En Banc Which Denies the Doctrine of Anticipatory Repudiation for Leases.**

All obligations legally due were fully paid to June 30, 1940, when lessees under claim of right surrendered the premises to terminate further personal liability under lease provision set out in the "summary" (page 4). If liability thus terminated, there was no further obligation (Tr. 47, Par. 16) (Answer and motion to dismiss, Tr. 24-25).

If not, the maximum liability possible was $400 rent due July 1, 1940, which respondent demanded by letter of July 3rd (Tr. 45) after advising by letter of June 28th (Tr. 45) that "he refuses to accept surrender." Taxes did not mature until December.

The legerdemain (not recognized as such below), on which alone respondent depended, started with letter of July 11th offered as a "two-edged sword." He voluntarily advised that "he was agreeable to leasing his interest" to "minimize his damages" but "with full reservation of rights against you" (Tr. 46, Par. 14).

If the former lessees owning one-third of the fee in common with him demurred in any way, that would deny his fee title and waive their surrender. If they joined

in renting their interest with him as demanded, it would be with full reservation of his rights (whatever they were). Renting at his demand was "without waiver of the respective rights of the parties" (Tr. 47). The fact of renting or re-entry itself is expressly admitted but is not waived (Par. 17, Tr. 47) but preserved by non-waiver.

The new tenant paid rent from August 1, 1940. Respondent sued August 2nd, basing the damages asserted by his complaint on the rent received and he offered proof of it at the trial (Tr. 55-63). His letter of July 11th; re-entry and suit served as withdrawal of his first refusal to accept surrender and of his demand for rent. He realized with only $400 involved there was no Federal jurisdiction. He accepted the surrender made as "thus repudiating the lease in its entirety" and his complaint (Tr. 2) so pleads. That accords with the Missouri doctrine applicable to commercial contracts, as stated in *Kurth* v. *Morgan*, (Mo. App.) 277 S. W. 50, l. c. 54, and thereby plaintiff sought to adopt:

> "the renunciation of a contract by so acting upon it as, in effect, to declare that he treats the contract as at an end except for the purpose of bringing an action upon it for damages sustained by him in consequence of such renunciation."

When confronted with the cases cited in the next Point and by *Babcock* v. *Rieger*, (Mo. App.) 76 S. W. 2d 731, 735, reading:

> "On default of tenant the landlord has three options:
>
> Option 1. To remain out of possession, treat term as subsisting and recover rent.
>
> Option 2. Give notice to tenant, resume possession and re-let to mitigate damages, collecting loss from tenant.
>
> Option 3. Re-enter, resume possession in own right and close the term. If no notice is given and

> landlord resumes possession, he is deemed to be doing so to terminate the lease."

he equivocated and the courts below accepted it. The opinion says he "protected his legal rights." That understates it because he attempted creation of non-existent rights. His change of position was that consent of petitioner to renting waived it. But *Gallop* v. *Murphy*, 160 Mo. App. 1, 141 S. W. 438, 439, says:

> "The facts disclosed a surrender by operation of law. Such a surrender takes place when by consent of both parties another becomes a tenant of the premises and the landlord collects rent from them."

See also to the same effect, *Smyth* v. *Boroff*, 135 S. W. 973, 975, 156 Mo. App. 18.

Why his letter of July 11th and his complaint did not constitute acceptance of surrender is not explained. Missouri law permits no such equivocation. Surrender must be accepted or refused.

**Acceptance of surrender discharged the lease under Missouri law. Nothing was due.**

**Refusal to admit acceptance of surrender left respondent with only a claim of $400 rent due under the lease.**

**There was no actual federal jurisdiction either way.**

Plain Missouri law was disregarded and equal protection of law was denied. Jurisdiction was not real, but only apparent through denial of equal protection of laws. The judgment is *coram non judice* because it rests on denial of due process of law as well as denial of equal protection of laws.

The discharged lease was enforced after re-entry, although it contained no covenant of indemnity to survive re-entry, or for acceleration of unaccrued payments, or for commutation at any interest rate. Plaintiff sought substitution of damages for all existing contracts rights, but none remained. Sec. 313 and Sec. 290, Restatement of Contracts. The judgment for him overthrows every

basic principle of Missouri law declared and consistently enforced by its courts at least since the adoption of the "Landlord & Tenant Act" still in force since 1855.

II.

**The Decision of the Circuit Court of Appeals and Judgment of the District Court Denied Equal Protection of Laws in a Diversity of Citizenship Case. The Basic Principles of Missouri Landlord and Tenant Law and the State's Declared Social and Economic Public Policy on Important Questions of Local Law Were Set Aside in Direct Conflict with Controlling Decisions of the Missouri Supreme Court, En Banc, on the Same Matters.**

*(District Courts of the Eighth Circuit are bound by the opinion to decide similar cases contrary to the decisions of the highest Missouri Courts.)*

The judgment and decision below declares: "the doctrine of total breach by anticipatory repudiation is applicable to contracts of lease" in Missouri (Tr. 107-8), and "the courts of Missouri do not appear to have passed upon the precise point" (Tr. 103).

That doctrine has three times been expressly denied for 99-year leases by the Missouri Supreme Court, *En Banc*, and has been consistently denied by the Supreme Court and Courts of Appeals for long or short term leases. Acceptance of surrender or actual or constructive re-entry by the landlord after abandonment is uniformly held to discharge the lease and to prohibit recovery for breach of all future unaccrued covenants. Here the surrender was accepted and re-entry was actual by re-renting and constructive by suit which disclaimed any rights of the former tenants under the lease. These cases deny the doctrine approved below applies to leases:

*Blond* v. *Hoffman*, 343 Mo. 247, 121 S. W. 2d 137.

*Blond* v. *U. S. F. & G. Co.*, 336 Mo. 684, 80 S. W. 2d 675.

*Blanke Bros. Realty Co.* v. *American Surety Co.*, 297 Mo. 41, 247 S. W. 797.

*Von Schleinitz* v. *North Hotel Co.*, 323 Mo. 1110, 23 S. W. 2d 64.

*Sharon* v. *American Fidelity Company*, 157 S. W. 972, 172 Mo. App. 309.

In each case repudiation or abandonment occurred before actual or constructive re-entry or acceptance of abandonment or surrender. Opinion Note 22 cites the *Von Schleinitz* case but overlooked its application in ruling on the right to maintain suit. Acceptance of repudiation is essential to maintain action for anticipatory breach of commercial contracts but its recognition for a lease equals constructive re-entry and effects a discharge of unaccrued covenants.[2] That the doctrine approved below contravenes Missouri law is shown by the uniform denial of recovery in all except the *Sharon* case.

Sharon tendered the benefits of the lease to defendant guarantor and *held them open for it at all times until after the accrual date of the covenant* guaranteed by the bond. Nothing of that kind was done here.

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[2]See cases cited in Opinion Note 2. There is no inequity in the result for the landlord may protect himself by a suitable covenant in his lease. *St. Louis Bill Posting Co.* v. *Stanton*, 172 Mo. App. 40, 154 S. W. 821; *Re McAllister Mohler Company*, 46 F. 2d 91, 95; *Wm. Filene's Sons* v. *Weed*, 245 U. S. 597, 38 S. Ct. 211, 62 L. Ed. 497; *Gardiner* v. *William S. Butler & Co.*, 245 U. S. 603, 38 S. Ct. 214, 62 L. Ed. 505; *Irving Trust Co.* v. *Perry*, 293 U. S. 307, 55 S. Ct. 150, 79 L. Ed. 379; *City Bank Farmers Trust Co.* v. *Irving Trust Co.*, 299 U. S. 433, 57 S. Ct. 292, 81 L. Ed. 324.

In applying the "anticipatory repudiation" theory only to commercial type contracts, the Missouri courts observe the limitations pointed out by this court in: *Roehm* v. *Horst*, 178 U. S. 1, 20 S. Ct. 780, 44 L. Ed. 953, cited (309 Mo. 276, 274 S. W. 699, l. c. 703); *Central Trust Co.* v. *Chicago Auditorium Co.*, 240 U. S. 581, 36 S. Ct. 412, 60 L. Ed. 811; *Gardiner* v. *Wm. S. Butler & Co.*, 245 U. S. 603, 38 S. Ct. 214, 62 L. Ed. 505; *New York Life Insurance Co* v. *Viglas*, 297 U. S. 672, 680, 56 S. Ct. 615, 80 L. Ed. 971, 976. The last three cases specifically except leases.

*Anticipatory repudiation denied for leases.*[3]

Many of the details in *Blond* v. *Hoffman* are amazingly parallel to this case. Where they differ they are legally equivalent to make operative the same rules of law. Blond's re-entry was accompanied by forfeiture notice, served after abandonment and repudiation. Re-entry here followed a contract right of surrender. Re-entry, admitted by agreed statement (Tr. 47, Par. 17), was made within the July quarter and discharged rent from then, as the *Sharon* case holds rent is not apportionable. Plaintiff had no claim for suit.

From *Blond* v. *Hoffman* we quote the following from abstract of briefs and argument at 343 Mo. l. c. 248 (which is not shown in the 121 S. W. 2d report) (*En Banc*):

> "* * * The petition was amended after the previous judgment was reversed and the cause remanded and new evidence was introduced showing that the *lessee had abandoned, renounced, and repudiated the lease and had taken bankruptcy,* thereby disabling himself from performing his obligations. *Title & Trust Co.* v. *Durkheimer Inv. Co.*, 63 Pac. 2d 909; *Central Trust Co.* v. *Chicago Auditorium Assn.*, 240 U. S. 581, 36 S. Ct. 412; *In re Neff*, 157 Fed. 61; *Gabriel* v. *Brick Co.*, 57 Mo. App. 526; *Porto Rico* v. *Title Guar. Co.*, 227 U. S. 382, 33 S. Ct. 362; *Sharon* v. *Amer. Fidelity Co.*, 172 Mo. App. 309, 157 S. W. 972."

This is from the opinion, 343 Mo. l. c. 250, 251, 121 S. W. 2d l. c. 138:

> "* * * At the second trial plaintiffs introduced evidence tending to prove that Hoffman, by his con-

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[3]The recovery here is subject to the same vice as that in *Miller* v. *Irving Trust Company*, 296 U. S. 256, 56 S. Ct. 189, 80 L. Ed. 211, where this court reversed because the complaint was not supported by the contract it alleged. There was no provision in the lease there for recovery after termination. Such a provision is not claimed for this lease.

duct, had indicated that he had abandoned the lease. No such evidence was introduced at the first trial. This, plaintiffs insist, changed the situation and entitled them to a judgment for the full amount of the bond. We do not think so. Plaintiffs took affirmative action in declaring the lease forfeited. They took absolute possession of the property and notified Hoffman that he had no rights on the premises. Plaintiffs took their choice of ending the relationship of lessor and lessee. Such action, *whether considered as an acceptance or an abandonment of the lease by the lessee*, or an absolute forfeiture by the lessor, accompanied with taking of possession, discharged Hoffman and his surety from covenants which were not breached and which were to be performed in the future. In 36 Corpus Juris 337, Section 1144, we read:

> 'The surrender of the leased premises by the tenant extinguishes the relation of landlord and tenant, and ordinarily releases the tenant from liability for rent accruing thereafter.'

Again in 36 Corpus Juris 338, Section 1146, we find the following:

> 'In order that the attempted surrender shall release the tenant from further payment of rent, it must be accepted by the landlord. Where, however, there has been such an acceptance, the surrender becomes complete and the tenant, in the absence of an agreement to the contrary, is discharged from liability for subsequently accruing rent (See also *Ehlert* v. *Woods*, (Idaho) 63 Pac. 2d 1000; *Sjoberg* v. *Hartz*, (Minn.) 271 N. W. 329; *Von Schleinitz* v. *North Hotel Co.*, 323 Mo. 1110, 23 S. W. 2d 64, l. c. 74-78 (1, 2), and authorities there cited; *St. Louis Billposting Co.* v. *Stanton*, 172 Mo. App. 40, 154 S. W. 821).'

In the Von Schleinitz case *the tenant abandoned the leased premises. The landlord entered into possession and leased the property to a third party.* This court held that *the lessor had accepted the abandon-*

> *ment and thereby terminated the lease.* This court also held that future rents could not be collected unless the lessor had notified the lessee that he was taking possession for the lessee's benefit" (Italics ours).

The only notice here was the landlord wanted to lease to a new tenant to mitigate *his damages.* That recognized no beneficial interest of the former tenants under the lease.

In the *Blond* case, as here, the lot was vacant. Hoffman, the tenant, paid no rent after October. The original briefs there show that Hoffman declared in October that he gave up the lot; he would not build and would go bankrupt, as he later did, as shown by the opinion on the second appeal. The facts are stated in more detail in *Blond* v. *U. S. F. & G. Co., supra,* which was the first appeal.

Blond gave forfeiture notice in March and May, following Hoffman's abandonment of the vacant lot and repudiation of obligation in October preceding. Constructive re-entry was then made by posting a "For Rent or Sale" sign. Here actual re-entry was made by renting to a new tenant and constructive re-entry by suit denying beneficial interest of the former tenants under the lease.

The *Blanke Bros. Realty Co.* v. *American Surety Co.* case, 297 Mo. 41, 247 S. W. 797, l. c. 800, says (*En Banc*):

> "In the bond before us there is no provision fixing liability of the surety in the event of the *abandonment of the lease by the Marsix Company and re-entry* by the lessor. * * *
>
> As said in the Sharon Case:
>
> 'If the landlord, *confronted with the lessee's default* and knowing his remedies, *elects to* exercise that which destroys the relation, *terminates the tenancy and avoids the lease,* he deprives himself of any right to rent accruing after

his severance of the relation and taking back the property.'

*If he deprives himself of the rent, he also deprives himself of the benefits accruing to him from the other provisions of the lease.*

In *Mullaney* v. *McReynolds*, 170 Mo. App. 406, l. c. 414, 155 S. W. 485, it is held that failure to pay the rent reserved and abandonment of the leased premises by the lessee gives lessor the right to re-enter the premises, and, when he does forfeit the lease and re-enter, the lease is terminated.

In *G. M. Mining Co.* v. *Hodge*, 185 Mo. App. 138, at page 147, 170 S. W. 689, 691, it was said:

> '*Any act amounting to an agreement* on the part of the tenant to abandon and *on the part of the landlord to resume* possession of the demised premises *amounts to a surrender by operation of law.*'

In *American Bonding Co.* v. *Pueblo Inv. Co.*, 150 Fed. 17, l. c. 21, 80 C. C. A. 97, 9 L. R. A. (N. S.) 557, 10 Ann. Cas. 357, it was said:

> *'The surrender of leased premises by the tenants during the term of the lease and the acceptance of the property by the landlord, without a notice that the latter takes and will hold and use it during the remainder of the term for the use and benefit of the tenants exclusively, closes the term* of the lease, and destroys all rights conditioned upon its subsequent continuance' " (Italics ours).

The *Von Schleinitz case* (cited in opinion Note 22, but not applied) is quite lengthy, 323 Mo. 1110 to 1149. Numerical reference is made below to paging of the official report for convenience of the court.

Von Schleinitz prayed $37,137 for accrued and *unaccrued rents* (1114) and enforcement of a lien under

his lease. *Unlike the lease here* it contained a clause providing that after re-entry, *"the obligation to pay rent for the full period of this lease shall not cease"* (1116). The court says (1138):

> "* * * But there is not a scintilla of evidence that plaintiff made any protest to Long against resuming possession of the premises, or that plaintiff informed or notified Long, as the agent and representative of the North Hotel Company, that plaintiff was taking possession of the premises for the benefit and account of the North Hotel Company, and would hold the North Hotel Company, as tenant, liable for the payment of any loss or deficiency of the future and unaccrued rents. * * * Furthermore, the written tender of possession made to defendants Hurst and Greer contains no recital or statement to the effect that plaintiff has resumed actual possession of the hotel premises under protest, or that possession of the premises is taken and resumed by plaintiff for the benefit and account of Hurst and Greer, or of the tenant, North Hotel Company, or that plaintiff will hold Hurst, Greer, or North Hotel Company, liable for any loss or deficiency of the unaccrued and future rents. * * *"

and at 1141:

> "* * * The original lease from Mehornay to Josephson provides that the 'sum of $15,000 (increased to $17,500) paid as advance rent * * * shall be bound by and subject to the payment of the rent herein provided for.' *The acceptance by appellant* (by operation of law) *of the surrender of the leased premises by the tenant*, North Hotel Company, *terminated the relation of landlord and tenant theretofore existing between said parties, in consequence of which the North Hotel Company was relieved of its liability for payment of the stipulated rents accruing after the month of March, 1925* * * *" (italics ours).

and at 1134-36 the scope of the ruling in *Producers Packing Co.* v. *Fischer* (Tr. 103, 108) (cited in opinion notes 2 and 15 as impliedly authorizing this suit) is defined

to be in accord with denial of recovery to Von Schleinitz. The Supreme Court quotes the following from the Producers Packing Case (1135-36):

> "'* * * Defendants, however, claim that plaintiff, upon the abandonment of the premises and equipment by Branson, having forfeited the lease and taken possession of the premises and operated the ice plant and machinery, elected to terminate the lease on September 13, 1923; that plaintiff's conduct terminated the lease and with it all unaccrued liabilities of the lessee upon his covenants and stipulations in the lease dependent upon the continuance of the term; that the principal not being liable for these, the sureties are not; that plaintiff is now suing for damages suffered after re-entry, and cannot recover the same, but the only items of damage that it may recover * * * is for the rent and liabilities accruing previous to the re-entry. We think there is no question but that defendants' contention is well taken (citing authorities).'"

*Sharon* v. *American Fidelity Company*, 172 Mo. App. 309, 157 S. W. 972, l. c. 975, says:

> "In the circumstances we think Kersting's actions *constituted an abandonment* of the lease. He defaulted in the rent and *compelled plaintiff*, for his own protection, *to enter*, he, Kersting, getting out without protest or an offer to make the improvements. * * *
>
> * * * But the law seems the same (at least we will concede it is the same), *even though the lessee is at fault*, and the *landlord may rightfully enter* and declare a forfeiture. Rent is a compensation for the use and occupation of the premises; and, in the absence of a contrary provision, when the latter ceases, rent does also. So, if the *landlord*, confronted with the lessee's default and knowing his remedies, *elects to exercise* that which destroys the relation, terminates the tenancy and *avoids the lease*, he *deprives himself of any right to rent accruing after his severance of the relation* and taking back the property. * * *" (Italics ours).

Recovery was permitted only because the landlord held the premises at all times until after accrual of the covenant with express invitation to the surety to accept the benefits of the lease. The re-entry here made and the suit disclaiming that the former lessees were entitled to any benefits under the lease forecloses possibility of maintaining the action.

That Missouri follows the New York rule in repudiating the doctrine in lease cases is shown also by *Puckett* v. *National Annuity Ass'n*, 134 Mo. App. 501, 114 S. W. 1039, which cites the leading New York case of *McCready* v. *Lindenborn*, 172 N. Y. 400, 65 N. E. 208.

For brevity, we refer and adopt our discussion of these cases, and of the economic and social public policy of Missouri, as set forth in Petition for Rehearing, Subd. VI, Tr. 126 to 130.

Litigation of this type frequently recurs. Under the Missouri statutory scheme, all possessory actions between landlord and tenant, except ejectment, must originate in the Justice of the Peace Courts. Most Justices of the Peace are not lawyers. Through natural respect for "federal law" this case will no doubt be followed and Missouri law denied until the appellate courts of Missouri have opportunity to expressly renounce the case as contrary to Missouri law. It is a matter of serious moment to every owner and tenant from the largest business house to the share croppers in Southeast Missouri who recently became a State and Federal problem as they lined the roads after crop failures. There is again a separate "federal rule" on this important subject.

## III.

**The Courts Below Failed to Declare and Apply the Missouri Law Declared by Its Highest Courts to Apply to Judgments Which Were Expressly Pleaded As Res Judicata, Estoppel and As Election of Remedies.**

The facts are fully stated in the "Statement and Summary," and were argued at length in petition for re-

hearing (Tr. 120-123). For brevity, without minimizing their importance, the statement and argument so made is adopted by reference. The decision below directly conflicts with the following controlling Missouri cases:

*Fulton Iron Works* v. *Riggin*, 14 Mo. App. 321.

*Case* v. *Sipes*, 280 Mo. 110, 217 S. W. 306, 309, subd. 10.

*Custer* v. *Kroeger*, 313 Mo. 130, 280 S. W. 1035, subds. 5-6.

*Cordia* v. *Matthes*, 344 Mo. 1059, 130 S. W. 2d 597.

*In re McMenamy's Guardianship*, 307 Mo. 98, 270 S. W. 662, l. c. 667, 674.

It conflicts also with Section 449, Restatement of the Law of Contracts, and with the following decisions of this court:

*Jackson* v. *Irving Trust Co.*, 311 U. S. 494, 61 S. Ct. 326, Adv. Op., 85 L. Ed. 310.

*Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, 60 S. Ct. 907, 84 L. Ed. 1263, subds. 18-24.

*Kessler* v. *Eldred*, 206 U. S. 285, 27 S. Ct. 611, 51 L. Ed. 1065.

*The Johnson Co.* v. *Wharton*, 152 U. S. 252, 14 S. Ct. 608, 38 L. Ed. 429.

## IV.

**The Courts Below Refused to Declare and Apply the Missouri Law of Waiver, and Its Law on the Construction of Independent Covenants in a Lease, As Declared by Its Highest Appellate Courts, and Erroneously Applied a Rule Declared for and Limited to Option Agreements, Which Has No Application to Independent Covenants.**

The facts are fully stated in the "Summary and Statement," and were argued in the petition for rehearing (Tr. 118-123). For brevity, without minimizing their importance, the facts and argument are adopted by refer-

ence. The opinion below conflicts directly with the law declared in:

*Freeland* v. *Mitchell*, 8 Mo. 487.

*Butler* v. *Manny*, 52 Mo. 497, l. c. 506, 507.

*Garnhardt* v. *Finney*, 40 Mo. 449.

*Watson Fireproof Window Co.* v. *Henry Weiss Cornice Co.*, 168 S. W. 905, l. c. 907, 908, 181 Mo. App. 318.

The court erroneously applied the law of option agreements, as pointed out (Tr. 124) in the petition for rehearing, which has no application to independent covenants such as this lease contains and which are erroneously construed.

On the question of waiver of the building covenant being equivalent to performance the opinion conflicts directly with:

*Springfield Gas & Electric Co.* v. *Southern Surety Co.*, 250 S. W. 78, l. c. 81 (Mo. App.).

*Bonnot* v. *Grand Lodge, etc.*, 81 S. W. 2d 360, 367, subds. 6, 7, 229 Mo. App. 519.

*District of Columbia* v. *Camden Iron Works*, 181 U. S. 453, 463, 21 S. Ct. 680, 45 L. Ed. 948, 954.

## CONCLUSION.

We respectfully submit that the grave public importance of the questions involved, and the establishment of a separate "federal rule" in landlord and tenant cases contrary to decisions of the highest Missouri courts impels issuance of the writ.

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